RECORD AND BRIEFS

No. 16-499

In The Supreme Court of the United States

JOSEPH JESNER, et al.,

Petitioners,

v.

ARAB BANK PLC,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF PROFESSORS OF LEGAL HISTORY BARBARA ARONSTEIN BLACK, WILLIAM R. CASTO, MARTIN S. FLAHERTY, STANLEY N. KATZ, MICHAEL LOBBAN, SAMUEL MOYN, AND ANNE-MARIE SLAUGHTER AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*

Amici curiae respectfully submit this brief pursuant to Supreme Court Rule 37 in support of Petitioners.[1] *Amici* (listed in Appendix A) are professors of legal history who have an interest in the proper understanding and interpretation of the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, and of this Court's decisions in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), and *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). Among the *amici* are individuals who filed an *amicus curiae* brief in *Sosa*,[2] the position of which this Court adopted in Part III of its opinion. *See* 542 U.S. at 713-14. Several of the *amici* also filed two *amici curiae* briefs in *Kiobel* concerning the historical context of the ATS.[3]

Despite this Court's decision in *Kiobel*, the Second Circuit has refused to find corporations liable under the ATS. *Amici* respectfully urge this Court to bring the Second Circuit in line with its sister courts in recognizing that corporate liability under the ATS is

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[1] The parties have consented to the filing. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than the *amici* or their counsel made a monetary contribution to this brief's preparation or submission.

[2] The *amici* who joined the *Sosa* brief are William R. Casto and Anne-Marie Slaughter.

[3] The *amici* who joined the *Kiobel* briefs are Barbara Aronstein Black, William R. Casto, Martin S. Flaherty, Stanley N. Katz, Michael Lobban, and Anne-Marie Slaughter.

consistent with the text, history, and purpose of the statute.

SUMMARY OF ARGUMENT

In *Sosa v. Alvarez-Machain*, this Court recognized that the First Congress intended the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, to provide jurisdiction over "private causes of action for certain torts in violation of the law of nations." 542 U.S. 692, 724 (2004).[4] As further acknowledged by this Court, the First Congress understood that the common law would give "practical effect" to this jurisdictional grant. *Id.* at 719-20.

The Second Circuit's decision to read a corporate exemption into the ATS is both inconsistent with the statute's plain text and contrary to congressional intent. The text creates a broad civil remedy ("all causes") for aliens and excludes no class of defendant from suit. The Founders established a federal forum to discharge the nation's duty, as the best method to provide a remedy for aliens and to avoid state courts hostile to foreigners.

To give effect to this broad remedial purpose, the First Congress intended that federal courts would, first, draw the norms governing prohibited conduct

[4] This brief is concerned with the original text of the ATS. An Act to Establish the Judicial Courts of the United States, ch. 20, § 9, 1 Stat. 73, 77 (1789). The text has not meaningfully changed, and any changes do not affect this brief's analysis.

from the law of nations and, second, look to the common law to resolve questions left unanswered by the law of nations. *See Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 778 (D.C. Cir. 1984) (Edwards, J., concurring). As relevant here, the First Congress understood that issues such as corporate liability – a method of allocating losses caused by agents' torts[5] – would be resolved based on common-law principles.

During the Founders' era, juridical entities were not exempt from liability for law of nations violations. Cases against entities resembling the modern corporation, such as the British East India Company or shipping enterprises, show as much. No corporate entities were immune from the familiar tenet that principals would bear the losses for their agents' torts in violation of the law of nations. The Founders would have been confounded at the idea that incorporation could insulate corporate actors from liability for their agent's wrongful acts.

As modern business corporations proliferated during the nineteenth century, courts readily applied established agency concepts to allocate damages to the corporation (the principal) for the actions of its employees (the agents). Accordingly, this Court should reject

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[5] Loss allocation is "a deliberate allocation of a risk. The losses caused by the torts of employees . . . are placed upon the employer because, having engaged in an enterprise . . . and sought to profit by it, it is just that he, rather than the innocent injured plaintiff should bear them; and because he is better able to absorb them, and to distribute them. . . ." W. Page Keeton et al., *Prosser & Keeton on Torts* § 69, at 500 (5th ed. 1984).

the ahistorical conclusion that the ATS does not recognize corporate liability.

ARGUMENT

I. THE FIRST CONGRESS PASSED THE ALIEN TORT STATUTE TO ENSURE A FEDERAL REMEDY FOR LAW OF NATIONS VIOLATIONS

The Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, vests federal courts with jurisdiction to provide a tort remedy for violations of the law of nations. The First Congress intended the statute to accomplish several goals; among these was forestalling the appearance of American complicity in such violations. The First Congress understood that the common law would resolve any legal questions left unanswered by the law of nations. A corporate exemption is nowhere in the common law of the time.

A. The Text of the Alien Tort Statute Does Not Exempt Any Class of Defendant

The best evidence of congressional purpose is the statute's text. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 718 (2004). The ATS identifies the plaintiff ("an alien") but is silent with regard to who may be sued. An Act to Establish the Judicial Courts of the United States, ch. 20, § 9, 1 Stat. 73, 77 (1789) ("Judiciary Act"). Nothing in the statute's text can be read to limit jurisdiction to suits against natural persons.

The ATS deliberately extended jurisdiction to "all causes" in tort for violations of the law of nations. *Id.* The word "all" evinces congressional intent to provide plaintiffs with broad remedies. To exclude a class of defendants would run counter to this text; a suit against a corporation is undeniably a "cause." *See Warren Mfg. Co. v. Etna Ins. Co.*, 29 F. Cas. 294, 295 (C.C.D. Conn. 1800) (Case No. 17,206). Had Congress intended to exempt particular defendants from ATS suits, it would have done so explicitly. *See, e.g.*, Judiciary Act, ch. 20, § 11, 1 Stat. at 78-79 (limiting defendants in other contexts). Excluding a class of defendants requires reading words into the text that Congress simply did not enact. No early interpreter did so. *See, e.g.*, 1 Op. Att'y Gen. 57 (1795) (not distinguishing among defendants and noting that ATS plaintiffs could include a "company").

B. The Alien Tort Statute Vests Federal Courts with Jurisdiction to Provide a Meaningful Remedy for Law of Nations Violations

Congress enacted the ATS as part of a larger effort to join the international community by embracing the law of nations, a set of international norms of conduct. *See Sosa*, 542 U.S. at 714-15; *see also* Anne-Marie Burley [Slaughter], *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 Am. J. Int'l L. 461, 483-84 (1989). The Founders were frustrated by the Articles of Confederation's limited powers to address law of nations violations and the state courts' ad

hoc attempts to fill the void. *Sosa*, 542 U.S. at 716-17; *see also* William R. Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violations of the Law of Nations*, 18 Conn. L. Rev. 467, 515 (1986).

International incidents, such as the so-called "Marbois affair," made this legal lacuna more apparent. In 1784, the Chevalier de Longchamps assaulted Mr. Marbois, the French Legation Secretary in Philadelphia. "Eventually de Longchamps was brought to trial in state court, with the virtually powerless Congress limited to passing a resolution 'highly approv[ing]' the action." *Sosa*, 542 U.S. at 492 (quoting 27 Journals of the Continental Congress 1774-1789, at 502-04 (G. Hunt ed., 1912)). This affair showcased the Confederation's impotence and proved to be an international embarrassment. The Founders at the 1787 Constitutional Convention thus were determined to draft a legal framework to avoid similar situations. *Id.* at 493-94.[6] To that end, the Constitution federalized control over foreign affairs. *See* 3 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 583 (James Madison) (J. Elliot ed., 1836) ("We well know, sir, that foreigners cannot get justice done them in these [state] courts. . . ."); Federalist No. 42, at 264 (James Madison) (C. Rossiter ed., 1961).

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[6] During the constitutional ratification process, another incident in New York led to a complaint from the Dutch government about the weak U.S. enforcement regime and reaffirmed the necessity of a federal remedy. Casto, *supra*, at 494 (discussing how Secretary John Jay could only recommend Congress pass a resolution urging New York to institute judicial proceedings).

The nascent United States was free to configure its law of nations enforcement mechanisms as it chose. International law did not define the domestic means of enforcement for law of nations violations, leaving such questions to the sovereign. *See* 13 Journals of the Continental Congress, 1774-1789, at 283 (W.C. Ford ed., 1909). The Founders' chosen solution was uniquely American: They distributed enforcement responsibility for international obligations among the three coordinate federal branches. *Cf. Henfield's Case*, 11 F. Cas. 1099, 1117 (C.C.D. Pa. 1793) (Case No. 6,360) (speech of Attorney General Randolph) (approving enforcement of international rights and obligations through myriad domestic legal and political approaches). The Founders intended the ATS to help fulfill the judiciary's role in this tripartite enforcement regime. *See* Slaughter, *supra,* at 478.

C. The Founders Intended the Alien Tort Statute to Draw on Common-Law Principles to Give the Statute Practical Effect

The ATS successfully brought a cause of action for a law of nations violation into the American legal regime, but provided little guidance as to its implementation. This is not surprising, as what the ATS truly accomplished was bringing "torts in violation of the law of nations . . . within the common law of the time." *Sosa*, 542 U.S. at 714. The Founders thus incorporated Blackstone's observation regarding the role played by the law of nations within English common law:

"The principal offences against the law of nations, [are] animadverted on as such by the municipal laws of England." William Blackstone, 4 *Commentaries of the Laws of England* *68 (G. Sharswood ed., 1886); *see Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 228 (1796) (Chase, J.) ("The law of nations is part of the municipal law of Great Britain. . . ."); 1 Op. Att'y Gen. 68, at *4 (1797) ("The common law has adopted the law of nations in its fullest extent, and made it a part of the law of the land."). To the Founders, animadversion "carried the broader implication of 'turn[ing] the attention officially or judicially, tak[ing] legal cognizance of anything deserving of chastisement or censure; hence, to proceed by way of punishment or censure.'" *Sosa*, 542 U.S. at 723 n.16 (quoting 1 *Oxford English Dictionary* 474 (2d ed. 1989)). In the American regime, the ATS gave federal courts cognizance over law of nations violations, allowing federal courts to provide common-law remedies – thereby bringing the law of nations within standard tort principles.

The First Congress incorporated domestic common-law principles into the implementation of the ATS because it intended the ATS to have "practical effect." *Sosa*, 542 U.S. at 719. To implement the statute's remedial purpose, Congress knew courts would need the common law to resolve ancillary issues. Historically, the common law always resolved such matters by providing background principles to give effect when the law of nations was silent on a particular matter. *See* Andre Nollkaemper, *Internationally Wrongful Acts in Domestic Courts*, 101 Am. J. Int'l L. 760, 795 (2007)

("Since international law determines only general principles . . . [it] relies on domestic law to supplement it with necessary detail and to adjust it to the domestic context. . . ."); *The Mary Ford*, 3 U.S. (3 Dall.) 188, 190 (1796).[7] Only by relying on such general principles could courts give concrete effect to ATS claims. Practically, because internationally constituted tribunals did not exist when the ATS was adopted, Congress could not have expected anything else. There were no international bodies to guide U.S. courts on issues such as corporate liability. The Founders would have expected judges to apply contemporary legal principles to provide a remedy for a wrong.

In particular, and as relevant here, the Founders understood the basic common-law principle that a master was responsible for the torts of his agent to apply equally to law of nations claims. *See* Matthew Bacon, 3 *New Abridgment of the Law* 560-62 (4th ed. 1778) (citing agency liability cases). For example, in *Booth v. L'Esperanza*, Judge Bee applied domestic agency law to enforce a law of nations norm adjudging a prize of war. 3 F. Cas. 885 (D. S.C. 1798) (Case No. 1,647). Judge Bee held that by the law of nations, "the

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[7] In the eighteenth century, general principles of international law, customary international law, and domestic law were not firmly distinct; all were part of the domestic law administered by judges (what *Sosa* called "the common law of the time," 542 U.S. at 714). To determine ancillary issues judges did not always identify the body of law on which they relied, because all were viewed as part of this domestic common law. Courts drew on such common-law principles for many issues, including agency, to provide appropriate remedies. *See infra* Part II.

captors acquired such a right [to the vessel] as no neutral nation could impugn, or destroy." *Id.* (quoting *The Mary Ford*, 3 U.S. at 198). By contrast, Judge Bee applied "the laws of this state," South Carolina, to find that a slave following his master's orders maintained the master's possession of the vessel. *Id.* at 885-86; *see also Bolchos v. Darrel*, 3 F. Cas. 810, 810-11 (D. S.C. 1795) (Case No. 1,607) (discussing domestic common-law doctrine of mortgagor rights in resolving an ATS case).

II. JURIDICAL ENTITIES WERE NOT EXEMPT FROM LIABILITY FOR THEIR AGENTS' TORTS IN VIOLATION OF THE LAW OF NATIONS

Historically, incorporation did not insulate juridical entities from suit for law of nations violations. Although the Founders did not encounter many corporations in their precise modern form, they were familiar with holding principals (including juridical entities) liable for their agents' misconduct. No court or attorney of the time presumed that law of nations violations would be treated any differently.

A. Early English Corporations, Including the British East India Company, Were Held Liable for the Torts of Corporate Agents

The English corporation was domestically created and governed by letters patent, which were government charters granted for enumerated functions. *See Hotchkis v. Royal Bank of Scotland*, (1797) 2 Eng. Rep. 1202, 1203 (H.L.); 6 Bro. P.C. 465, 466. Like modern corporations, early incorporated entities were legal persons governed by domestic law. *See* Pet. of Royal Bank of Scotland (July 18, 1728), at 3 (corporations were "considered as one Person" before the law). As such, the corporations were "capable in law to sue and be sued." *Hotchkis*, 6 Bro. P.C. at 465; *see Cojamaul v. Verelst*, (1774) 2 Eng. Rep. 276, 277 (H.L.); 4 Bro. P.C. 407, 408 (company has powers to "sue and be sued"); *Moodalay v. The East India Company*, (1785) 28 Eng. Rep. 1245, 1246 (Ch.); 1 Bro. C.C. 469, 471 (treating Company as similar to natural persons).[8]

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[8] English procedural hurdles did curtail the number of suits against corporations, but no court suggested that the corporate form itself shielded companies from suit. A major hurdle was that a corporation itself could not produce its books in court as that would require the swearing of an oath as to their authenticity, which the corporation could not do as a soulless body aggregate. *See* Patrick Devlin, *Jury Trial of Complex Cases: English Practice at the Time of the Seventh Amendment*, 80 Colum. L. Rev. 43, 46 (1980). Without the books, it was difficult to know whether the corporation had authorized a given act, and such authorization could be a prerequisite to corporate liability under eighteenth-century agency law. *See, e.g., Wych v. Meal*, (1734) 24 Eng. Rep. 1078 (Ch.); 3 P. Wms. 310; *Shelling v. Farmer*, (1725) 93 Eng.

Furthermore, incorporation did not shield a juridical entity from liability for its agents' actions. In 1666, for example, Thomas Skinner sued the East India Company in London for "robbing him of a ship and goods of great value, . . . assaulting his person to the danger of his life, and several other injuries done to him" by Company agents beyond the realm.[9] *The Case of Thomas Skinner, Merchant v. The East India Company*, (1666) 6 State Trials 710, 711 (H.L.). Skinner's claims partly stemmed from the Company stealing his ship, "a robbery committed *super altum mare*." *Id.* at 719. Taking a ship on the high seas – *super altum mare* – was piracy and therefore a violation of the law of nations. James Kent, 1 *Commentaries on American Law* 171 (1826). The House of Lords feared that failure to remedy acts "odious and punishable by all laws of God and man" would constitute a "failure of justice." *Id.* at 745. Faced with "a poor man oppressed by a rich company," *id.*, the Lords decreed that the "Company should pay unto Thomas Skinner, for his losses and damages sustained, the sum of 5,000*l.*" *Id.* at 724.

Rep. 756, 756 (K.B.); 1 Str. 646, 646-47. Plaintiffs would get around this hurdle by suing corporate agents, who could swear to the books' authenticity. No court suggested that this legal fiction meant the agent was the party responsible for paying damages resulting from the tortious conduct.

[9] Of all eighteenth century business entities, the East India Company "resembled more closely the modern corporation, with limited liability, transferable shares, and trading capital owned in the name of the company." Gerard Carl Henderson, *The Position of Foreign Corporations in American Constitutional Law* 12 (1918).

The Company's perception of its liability turned on the issue of corporate agency. The Company conceded its liability for agents' acts undertaken by its order or with its knowledge:

> [T]he Company are not liable for the debt or action of their factors, *unless done by their order*; and if the Company should be liable to every one's clamours, and pretences for wrongs done, or pretended to be done by their factors (when if any such thing were done the same was not by their *order or knowledge*, nor applicable to their use and account) the same will necessarily impoverish and ruin the Company: And the Company gave no order for the seizure of Thomas Skinner's ship. . . .

Id. at 713 (emphasis added).[10] The Company argued only that it could not be held liable for the unauthorized acts of its agents. By awarding damages, the Lords apparently either rejected this argument or believed that the Company had authorized piracy. *Id.* at 724.

Neither party made reference to the law of nations in arguing the issue of corporate agency: The law of nations defined only the norm (against piracy), not who should bear the losses. As with any other cause of action, the Company was responsible for its agents' torts

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[10] The Company contested the jurisdiction of the House of Lords but *never* suggested that its corporate form exempted it from liability. *See* 6 State Trials at 718-19.

pursuant to standard common-law doctrine.[11] *See Eachus v. Trs. of the Ill. & Mich. Canal*, 17 Ill. 534, 536 (1856) (reading *Skinner*'s holding as "the courts could give relief" for actions of Company agents "notwithstanding these [actions] were done beyond the seas").

The same principles applied to all of the Company's agents, including their governors (the *de facto* colonial rulers in various parts of the world). Courts would first determine whether the governor acted within the authority granted to the Company as a juridical entity by letters patent. If the governor's actions were found to be within the letters patent, then the court next considered whether the action was within the scope of his agency to the juridical entity. *See Horn v. Ivy*, (1669) 86 Eng. Rep. 33, 33-34 (K.B.); 1 Ventr. 47, 47-48 (corporation may authorize acts beyond letters patent through general agency). If his actions deviated from the scope of his agency, liability may attach to the governor personally, for he had committed a "frolic." If the governor's actions were within the scope of his agency, the proper defendant could be the corporation – the same as for any other agent. *See* Stewart Kyd, 1 *A Treatise on the Law of Corporations* 261-62 (1793) (corporation may authorize specific acts by deed); *id.* at 314 ("It seems that the acts of the regular servants of a corporation, done in their official character, shall in general bind the corporation.").

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[11] The Company also regularly acknowledged liability for agents' torts in other contexts. *See, e.g.*, *Ekins v. The East India Company*, (1718) 1 Eng. Rep. 1011, 1012 (H.L.); 2 Bro. P.C. 382, 383; 1 P. Wms. 395; *Shelling*, 93 Eng. Rep. at 756.

In the 1770s, Armenian merchants sued the Company's Governor of Bengal, Harry Verelst, for "trespass, assault, and false imprisonment" by Company agents. *Rafael v. Verelst*, (1775) 96 Eng. Rep. 579, 579 (K.B.); 2 Black. W. 983, 983 (*Rafael 1*). Liability turned on whether the Nawab of Bengal was acting as a "mere creature" of the Company. *Id.* at 580. Ruling on a special verdict, the court ultimately found the Nawab to be a Company agent and assessed substantial damages against Verelst. *See Rafael v. Verelst*, (1776) 96 Eng. Rep. 621, 622-23 (K.B.); 2 Black. W. 1055, 1058-59 (*Rafael 2*).[12]

In consultation with Verelst, Company advisors settled on an approach that strategically protected Company assets; they decided it was "prudent" for Verelst to "support the Prosecutions in his own name." *See* App'x B (Deliberations of British East India Company Committee of Correspondence (N.D. CA. 1776)). Based on advice of counsel, the Board of Directors decided that a jury would grant smaller damages "against an Individual, than against a Company as a

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[12] *See Rafael 1*, 96 Eng. Rep. at 581 (opinion of DeGrey, C.J.) (Unlike other judges in initial case, "I consider him [the Nawab] but as an agent, or instrument in the hands of the defendant."); *Rafael 2*, 96 Eng. Rep. at 623 (opinion of Blackstone, J.) ("The Nabob is a mere machine, – an instrument and engine of the defendant."). The same merchants brought suit in England in a series of similar cases. *Rafael 1*; *Rafael 2*; *Cojamaul*, 2 Eng. Rep. 276; *Nicol v. Verelst*, (1779) 96 Eng. Rep. 751 (K.B.); 2 Black. W. 1278 (case involving Company's arrest of merchant for infringement on its trade monopoly); *Bolts v. Purvis*, (1775) 96 Eng. Rep. 601 (K.B.); 2 Black. W. 1022 (same).

collective body." *Id.* Although seeking to minimize liability, the Company still acknowledged that Verelst had acted within his "Duty" to the Company.[13] *See* App'x D (Correspondence with the Court of Directors); *cf.* App'x C (Company Committee for Law Suits discussing case against Company and Sir Thomas Chamber and deciding Chamber should "give in his answere [sic] Before the Company . . . as may be most secure and Advantageous to the Company").

B. Courts Allocated Losses to Ships as Juridical Entities for Law of Nations Violations

Although business corporations were uncommon in the late eighteenth century, the Founders were entirely familiar with a comparable limited-liability business entity: the ship. Because the owners of these vessels seldom sailed with their ships, owners were almost never present when their ship became entangled in a legal dispute. Therefore, courts often could not obtain what we now call personal jurisdiction over the owners. The time-honored solution was to sue the ship

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[13] The Company decided that Verelst "should be supported by the Company and indemnified from the Damages and Costs given against him." App'x D. Verelst had "readily undertook the defence of the Suit under a full confidence" of the Company's "firm support & assistance *considering the Cause the Companys* & not his own." App'x B (emphasis added).

rather than the owners, including for violations of the law of nations.[14]

The Founders had a functional understanding of a ship operating as an enterprise. As with a limited liability corporation, ownership and control were separated – owners invested money in their ships while selecting separate management (the captain) to run the day-to-day operations. Once a ship sailed from its homeport, the captain operated the enterprise beyond the owner's effective control, but not his ultimate liability. Thus, although *in rem* jurisdiction would technically hold a ship itself liable for a tort, the Founders understood this conceit as the legal fiction it was. *In rem* jurisdiction circumnavigated the limited personal jurisdiction over the entity ultimately liable – the owner, who stood to lose the most from the ship's forfeiture.[15] John Marshall explained:

> [I]t is a proceeding against the vessel, for an offence committed by the vessel. . . . It is true, that inanimate matter can commit no offence. The mere wood, iron, and sails of the ship, cannot, of themselves, violate the law. But this body is animated and put in action by the

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[14] Lower courts have correctly understood this history. *See Flomo v. Firestone Nat'l Rubber Co., LLC*, 643 F.3d 1013, 1021 (7th Cir. 2011) ("And if precedent for imposing liability for a violation of customary international law by an entity that does not breathe is wanted, we point to *in rem* judgments against pirate ships.").

[15] Of course, a libellant (plaintiff) who traveled to the ship's home port could sue the owners personally and the ship *in rem*. *See, e.g., Talbot v. Commanders & Owners of the Three Brigs*, 1 U.S. (1 Dall.) 95 (High Ct. Err. & App. Pa 1784).

> crew, who are guided by the master. The vessel acts and speaks by the master. She reports herself by the master. It is, therefore, not unreasonable, that the vessel should be affected by this report [i.e., the master's misconduct].

The Little Charles, 26 F. Cas. 979, 982 (C.C.D. Va. 1818) (Case No. 15,612); *accord The Malek Adhel*, 43 U.S. (2 How.) 210, 234 (1844); *The Palmyra*, 25 U.S. (12 Wheat.) 1, 14 (1827) ("The thing is here primarily considered the offender, or rather the offence is attached primarily to the thing."); *Three Brigs*, 1 U.S. at 99.

The rationale for subjecting ships to suit follows the fundamental purposes of tort law: To ensure an effective remedy and deter wrongful acts committed as part of the enterprise. To accomplish these goals, ships were sued frequently for the crew's misconduct. *See The Little Charles*, 26 F. Cas. at 982 (case against ship for crew's actions "does not the less subject her to forfeiture, because it was committed without the authority, and against the will of the owner"); *The Malek Adhel*, 43 U.S. at 233 (claim against ship for crew's actions considered "without any regard whatsoever to the personal misconduct or responsibility of the owner thereof"). Many of these cases, of course, involved violations of the law of nations, as ships traversed the seas, engaging in acts that crossed the line into piracy. *See, e.g., The Malek Adhel*, 43 U.S. (2 How.) at 233-34; *The Mariana Flora*, 24 U.S. (11 Wheat.) 1, 40-41 (1826) ("piratical aggression by an armed vessel . . . [which] may be justly subjected to the penalty of confiscation for such a gross breach of the law of nations."); *cf. The*

Resolution, 2 U.S. (2 Dall.) 1, 3-5 (Fed. App. Pa. 1781) (adjudicating questions of capture and damages and finding domestic courts are proper venues for assessing same); *The Lively*, 15 F. Cas. 631, 632-34 (C.C.D. Mass. 1812) (Case No. 8,403) (same).

In cases against ships, domestic law always determined questions of who should be held liable.[16] In *The Mary Ford*, for example, the trial judge stated:

> [F]or a long time, the law of nations has been settled on principles consonant to justice and humanity, in favour of the unfortunate proprietors; and the persons who have found and saved the property, have been compensated by such part thereof, or such pecuniary satisfaction, as the laws of particular States have specially provided, or, in want of such provision, (as the writers on the law of nations agree) by such reward as in the opinion of those who, by the municipal laws of the country, are to judge, is equitable and right. In our country, no special rule being established, this court is to determine what, in such case, is equitable and right.

3 U.S. at 190. Courts thus used domestic agency principles to determine who should bear the losses caused

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[16] Domestic law similarly governed all other issues aside from the substantive norm, which was usually a violation of the law of nations. *See, e.g.*, *Talbot v. Jansen*, 3 U.S. (3 Dall.) 133 (1795) (rights of French privateer determined by law of nations; domestic law governs whether captain is properly considered privateer); *The Palmyra*, 25 U.S. at 14-15 (discussing use of domestic *in rem* jurisdiction for forfeiture of suspected pirate vessel).

by a tort and how those losses should be allocated. *See Three Brigs*, 1 U.S. at 95 (owners held partially liable when their ships wrongfully captured another vessel); *The Amiable Nancy*, 16 U.S. 546, 558-59 (1818) (domestic law allocates "responsibility for the conduct of the officers and crew" to owners who although "innocent of the demerit of this transaction" are "bound to repair all the real injuries and personal wrongs sustained by the libellants, but they are not bound to the extent of vindictive damages"); *see also Purviance v. Angus*, 1 U.S. (1 Dall.) 180, 185 (High Ct. Err. & App. Pa. 1786) (allowing some recovery against malfeasant captain involved in same incident as *Three Brigs*).[17]

Eighteenth-century courts thus allowed tort actions against ships to ensure an adequate remedy for torts committed by a ship's captain and crew. Courts today should follow the Founders' lead and allow an action against corporations as "the only adequate means of suppressing the offense or wrong, or insuring an indemnity to the insured party." *The Malek Adhel*, at 233-34.

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[17] English courts likewise applied agency principles to shipmasters and owners. *See, e.g.*, *The Vrouw Judith*, (1799) 165 Eng. Rep. 130, 130; 1. C. Rob. 150, 151 ("[T]he act of the master of the vessel binds the owner in respect to the conduct of the ship as much as if it was committed by the owner himself.").

III. AS THE MODERN CORPORATION EMERGED, COURTS USED THE SAME DOMESTIC COMMON-LAW PRINCIPLES TO ALLOCATE LOSSES AGAINST CORPORATIONS FOR THEIR AGENTS' TORTS

When English courts first grappled with the liability of the East India Company, the use of the corporate form to organize a business was rare. Nevertheless, English courts determined that the Company was liable for its agents' torts, including law of nations violations.[18] Similarly, when English and American courts dealt with maritime business activities, the courts resorted to the legal fiction that ships themselves were liable for torts.

In the early nineteenth century, when the modern corporation proliferated, American courts quickly applied the same logic to the new legal entities. In particular, courts came to understand that a corporate tort was not a corporate action per se, but a way of apportioning damages to the corporation for torts committed by its agents. *See* Gary T. Schwartz, *The Character of Early American Tort Law*, 36 UCLA L. Rev. 641, 649-51 (1989). Shortly after the adoption of the ATS,

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[18] English courts applied the same rules in tort cases not involving the law of nations. *See, e.g., Mayor of Lynn v. Turner*, (1774) 98 Eng. Rep. 980 (K.B.); 1 Cowp. 86; *Yarborough v. The Bank of England*, (1812) 104 Eng. Rep. 990, 990 (K.B.); 16 East. 6, 7 (company "liable to the consequences of such act [done or ordered on its behalf], if it be of a tortious nature, and to the prejudice of others"). Whether a case involved the law of nations was irrelevant to the question of whether these tort principles applied.

corporate liability became commonplace based on these domestic agency principles.

A. As Private Business Corporations Emerged in America, Courts Held Them Liable for Actions of Corporate Agents

Business corporations were rare when the First Congress adopted the ATS. "The archetypal American corporation of the eighteenth century is the municipality, a public body charged with carrying out public functions." Morton J. Horwitz, *The Transformation of American Law 1780-1860* 112 (1977); *see also* Schwartz, *supra*, at 648. By 1780, "colonial legislatures had conferred charters on only seven business corporations, and a decade later that number had increased to but forty." Horwitz, *supra*, at 112; *see also* Simeon Eben Baldwin, *History of the Law of Private Corporations in the Colonies and States*, *in* 3 *Select Essays in Anglo-American Legal History* 236, 250 (1909).

Founding-era jurists regarded the corporation "as an artificial and suspicious statutory entity." Schwartz, *supra*, at 649. Eighteenth-century American courts sought to cabin corporate power by limiting corporate rights and duties to those enumerated in their charters.[19] As American corporations proliferated and pursued more modern functions, domestic common law

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[19] As discussed, some eighteenth-century jurists believed a corporation could only authorize conduct permitted by its charter. Since a corporation's charter would not authorize tortious conduct, torts were frolics, and the remedy lay against the "tortious employee." Schwartz, *supra*, at 649. Blackstone's statement that

recognized the changes and adapted.[20] *Id.* at 650. In particular, courts held that the profit-making engaged in by the modern entities could give rise to torts committed by company agents. In this sense, these entities resembled the English chartered corporations. *See supra* Section II.A. Likewise, as corporations became increasingly important to trade and commerce, courts applied loss-allocation principles against the enterprise to provide a meaningful remedy to injured parties. As with the case of *in rem* liability, corporate liability was necessary to suppress the offense and to compensate the injured party. *See supra* Section II.B.

By the early nineteenth century, the evolution in American treatment of corporations was complete. Courts had severed corporate liability from earlier formalistic preconditions and dismissed the fiction that torts were frolics. *See Riddle v. Proprietors of Merrimack River Locks & Canals*, 7 Mass. (7 Tyng) 169, 178, 185 (1810) (corporation may be liable for damages or amercement as "some actions of trespass might,

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a corporation could not "sue and be sued" for "personal injuries" exemplified this instrumentalized conception of the corporation, typified by narrowly chartered public corporations. William Blackstone, 1 *Commentaries of the Laws of England* *475-76 [1753] (G. Sharswood ed., 1893). The concept was never a complete preclusion of such liability, as evidenced by the cases discussed above. *See supra* Section II. The jurists in those cases derived corporate liability from Blackstone's agency and contract principles, not from his primitive conception of corporations.

[20] The Founders knew of the evolution of common-law tort principles and expected the law to develop over time, including in the context of entity liability and loss allocation.

at common law, be maintained against aggregate corporations"); *Chestnut Hill & Springhouse Tpk. Co. v. Rutter*, 4 Serg. & Rawle 6, 12-13 (1818) (stating master-servant relationship may create corporate liability). Courts further recognized that losses for torts attributable to the corporation should be allocated against the corporation's funds. *See, e.g., Adams v. Wiscasset Bank*, 1 Me. 361, 364 (1821) (losses assessed against bank's corporate fund); *Smith v. Bank of Washington*, 5 Serg. & Rawle 318, 319-20 (1819) (corporate form means bank's "responsibility is limited to its own funds"); *Riddle*, 7 Mass. at 187-88. And by the middle of the nineteenth century, the principles were so accepted, this Court could write: "At a very early period, it was decided in Great Britain, as well as in the United States, that actions might be maintained against corporations for torts; and instances may be found, in the judicial annals of both countries, of suits for torts arising from the acts of their agents, of nearly every variety." *Phila., Wilmington, & Balt. R.R. v. Quigley*, 62 U.S. (21 How.) 202, 210 (1859); *cf. United States v. Amedy*, 24 U.S. (11 Wheat.) 392, 412-13 (1826) (extending the "unquestionable" principle that corporations are liable under civil law to a penal statute).

B. Early American Courts Understood Corporate Liability as a Method of Allocating Losses to Corporate Principals for Agents' Torts

Concomitant with the establishment of the modern business corporation, courts began regularly assessing damages against corporations for employees' torts. *See Chestnut Hill*, 4 Serg. & Rawle at 12. Then, as now, corporate liability was understood as a means of allocating losses to corporate principals for agents' torts, not as a separate norm of conduct. *Prosser & Keeton* § 69, at 500 ("The losses caused by the torts of employees, which . . . are sure to occur in the conduct of the employer's enterprise, are placed upon the enterprise itself, as a required cost of doing business."); *see* Young B. Smith, *Frolic and Detour IV*, 23 Colum. L. Rev. 716, 718 (1923); *cf.* Thomas M. Cooley, *A Treatise on the Law of Torts, or the Wrongs which Arise* 67-68 (John Lewis ed., 1907) (rule "well settled" that corporations are liable for agents' torts).

The 1818 *Chestnut Hill* case explicitly rejected the idea that corporations were somehow uniquely exempt from liability for their agents' torts. 4 Serg. & Rawle at 6. Instead, the court considered it axiomatic that the corporation was liable for its servants' trespass because "[t]he rule between corporations and their servants, is substantially the same," as between natural persons and their servants. *Id.* at 11; *see* Joseph K. Angell & Samuel Ames, *Treatise on the Law of Private Corporations Aggregate* § 328 (4th ed. 1840); *cf. Bank of Columbia v. Patterson's Adm'r*, 11 U.S. 299, 305

(1813) ("acts" of corporate agent "within the scope of his authority, would be binding on the corporation"); *Bank of the United States v. M'Kenzie*, 2 F. Cas. 718, 721 (C.C.D. Va. 1829) (No. 927) (finding no meaningful distinction between corporate and natural person).

Nineteenth-century courts never adopted a formalistic approach limiting corporate liability to acts authorized by the charter. Instead, nineteenth-century courts affirmed that a "master is responsible for the [illegal] acts of the servant, not because he has given him an authority to do an illegal act, but from the relation subsisting between them." *Chestnut Hill*, 4 Serg. & Rawle at 12; *see, e.g.*, *Townsend v. Susquehanna Tpk. Rd. Co.*, 6 Johns. 90, 90 (N.Y. Sup. Ct. 1810) (corporation liable for servant's negligence); *Wilson v. Rockland Mfg. Co.*, 2 Del. 67, 67 (Del. Super. Ct. 1836) (same); *Moore v. Fitchburg R.R. Corp.*, 70 Mass. (4 Gray) 465, 465 (1855) (same); James Grant, *A Practical Treatise on the Law of Corporations in General* 278 (1850); Francis Hilliard, 2 *The Law of Torts or Private Wrongs* 474-75 (1859). As this Court stated in 1859, "for acts done by the agents of a corporation, either *in contractu* or *in delicto*, in the course of its business, and of their employment, the corporation is responsible, as an individual is responsible under similar circumstances." *Quigley*, 62 U.S. (21 How.) at 210.

Chestnut Hill also exemplifies the loss allocation principles evolving within the common law. The court decried the "mischievous" consequences of demanding plaintiffs seek remedy from "laborers who have no property to answer the damages." 4 Serg. & Rawle at

17; *see also* Schwartz, *supra*, at 650 (*Chestnut Hill* part of movement to "modernize the rules of corporate liability" and to allocate losses to corporate principals). Like their precursor juridical entities, modern corporations thus became liable for their agents' torts. And, as in the eighteenth-century equivalent cases, nineteenth-century corporate-tort liability did not exclude liability for agents' torts in violation of the law of nations.

CONCLUSION

History – in both American and English courts – indicates that courts can render tort judgments against corporations for violations of the law of nations, using domestic law to allocate losses for injuries committed by corporate agents. Incorporation has never shielded juridical entities from liability. *Amici* thus respectfully urge this Court to overturn the Second Circuit's ruling to the contrary.

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APPENDIX A

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APPENDIX B

DELIBERATIONS OF BRITISH EAST INDIA COMPANY COMMITTEE OF CORRESPONDENCE (N.D. CA. 1776)

These Deliberations relate to the British East India Company's litigation strategy in *Rafael v. Verelst*. The Deliberations are found in Correspondence with the Court of Directors and related papers on lawsuits brought by William Bolt's Armenian agents, Harry Verelst Papers, Eur 218/69, India Office Records, British Library, London, UK. The Committee of Correspondence was the Company's chief operating committee and consisted of the Chairman, Deputy Chairman, and senior directors of the Court (i.e., Board) of Directors. Anthony Farrington, *Guide to the records of the India Office Military Department*, IOR L/MIL & L/WS 1 (1982). The Deliberations follow:

Mr. Verelst finding the Armenians had Petitioned the Court of Drs and threatened Prosecutions. Mr. V- in person applied to the Directors but more particularly to the Committee of Correspondence, & requested their Protection should any Prosecution take place against him. Prosecutions were immediately commenced, and on the repetition of Mr. Verelst request, the Committee of Correspondence consisting of [names not inserted]

consulted with Mr. Sayre their Council [sic], as the measures most prudent to be pursued the result of this advice was that Mr. V- should support the Prosecutions in his own name; for this reason that should Damages be given by a Jury, they would be to a less amount

against an Individual, than against a Company as a collective body. Mr. V- therefore readily undertook the defence of the Suit under a full confidence from the whole tenor of their conduct & assurances that he should at all times have their firm support & assistance, considering the Cause the Companys & not his own.

APPENDIX C

UPON DEBATE OF THE WHOLE BUSINESS TOUCHING THE BILL OF THE SONS OF GREENHILL AGAINST THE COMPANYE & SIR THOMAS CHAMBER, ATT A COMITTEE FOR LAW SUITES 23 JUNE 1668

This document is from the East India Company: Minutes of the Court of Directors and Court of Proprietors 1599-1858, IOR/B/29, India Office Records, British Library, London, UK. The Committee on Law Suits was one of a number of committees established by the Court of Directors of the East India Company to manage the detailed business of the Court. *See* Martin Moir, *A General Guide to the India Office Records* (1988).

> Att a Comittee for Law Suites 23 June 1668
> Present
> Governor: John Jollife Esq.
> Sr Andrew Riccard
> Nicholas Morrice Esq.
>
> Upon Debate of the whole Business touching the Bill of the Sons of Greenhill against the Company & Sir Thomas Chamber. & Mr. Moses was Directed Seriously to consider and advise there-upon, and whether Best for Sir Thomas Chamber to give in his answere Before the Company or after, or that they put in their answeres joyntly togather, and to proceed upon the whole as may be most secure and Advantageous to the Company.

The Committee were of opinion that Sir Thomas Chamber doe put in his answer first.

APPENDIX D

PAPERS OF HARRY VERELST, EAST INDIA COMPANY SERVANT, BENGAL; GOVERNOR OF BENGAL 1767-69

These documents are found in Correspondence with the Court of Directors and related papers on lawsuits brought by William Bolt's Armenian agents, Harry Verelst Papers, Eur 218/69 ff. 98a-100a, India Office Records, British Library, London, UK.

[Page 1]

To the Honble [sic] the Court of Directors for the Affairs of the United Company of Merchants of England trading to the East Indies.

The Memorial of Harry Verelst Esq. late President and Governor of Fort William in Benga[l]

Gentlemen

By the Report of the Committee of Correspondence and Law Suits of the 12th June 1776 on the several Memorials presented to you praying an Indemnification against the Armenian Suits – it appears the Committee were of Opinion that I should be supported by the Company and indemnified from the Damages and Costs given against me in the Actions and also the Costs of defending the same.

The said Report, with the Commees [sic] Recommendation, was afterwards laid before the Court of Proprietors who were pleased to order the Damages and Costs recovered by

the Armenians to be paid and they were paid accordingly.

That your Memorialist has been greatly harassed and vexed with the said Suits for upwards of seven years and been put to great Costs and Expenses in defending the same to the amount of [not inserted.]

That in regard it appeared to the Committee on a

[Page 2]

full Investigation of the facts and Circumstances of the Case respecting the Armenians that your Memorialis[t] had been actuated by a Sense of Duty to the Company on his Station of President and Governor of Fort William and not from any private or Interested Motives – He therefore humbly hopes you wil[l] not permit him to suffer in his private fortune but think it also reasonable to indemnify him against the Expenses incurred in defending the said Suits.